No. 10-327

Supreme Court, U.S.
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In The Supreme Court of the United States

MARK CAPENER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Argument

I. The Hyde Amendment, the Department, and the Case

The government's opposition is an odd product to receive from the Solicitor General's office at the certiorari stage, as its brief focuses on the merits, rather than criteria for certiorari. The government contends that the Ninth Circuit was "correct" (Opp.8), and glosses over the divisions among the lower courts as not "meaningful" (Opp.10), or not "outcome-determinative" (Opp.8) in this case. It even injects an entirely new question–not reached by the court of appeals, or raised in the Petition–that is argued to support the result (Opp.13-14). (See Point IV, below).

However, at the certiorari stage, the primary consideration is not whether the decision below is correct, but whether the questions presented are sufficiently important to warrant this Court's attention. The Petitioner believes that the appellate reversal of the district court's award was incorrect, and that the award should have been enlarged on appeal. But full development of those arguments requires a merits briefing; the immediate question is whether this Court should take up the case.

In this regard, the Court should consider that the government's incentives in this case differ from most other cases presented for this Court's review, given the focus of the case on the fee-shifting Hyde Amendment. The Solicitor General is part of the same Department whose activities are the primary

regulatory target of the statute, and the Department's responsibility is institutional and financial: awards under the Hyde Amendment are payable from the prosecuting agency's previously appropriated funds, and "[n]o new appropriations shall be made as a result of this provision," 18 U.S.C. § 3006A note (set forth at Pet.3-4). Therefore, the Department's incentives in this case are more like those of an interested private party, and do not reflect the usual degree of detachment from the result.

The Department has been a constant foe of the Hyde Amendment, before and after its enactment in 1997. So far as we are aware, the Department follows a practice of opposing virtually all Hyde motions, and appealing virtually all Hyde awards, no matter what the underlying conduct.[1] The resultant confusion in the lower courts (discussed in Point II, below), coupled with deferential standards of review, have managed to keep the Hyde Amendment away from this Court's consideration for 13 years, and the Department seeks to prolong that result here. All of this is understandable from the perspective of an frequent litigant whose self-interest is at stake, and is

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[1] See note 2, below. The most notable but partial exception is *United States v. Aisenberg*, 358 F.3d 1327 (11th Cir. 2004), where a husband and wife were indicted in connection with the disappearance of their own child. The Department conceded Hyde liability, but contested the amount and resisted full disclosure of its own activities.

naturally inclined to defend its own agents' actions. But it has little to commend itself from in terms of the public interest in ensuring the ethics and fairness of the prosecution function, or fidelity to the Congressional policy to compensate victims of federal prosecutorial overreach.

In this case, the Petitioner Dr. Capener was prosecuted for what amounted to a "statistical" offense, i.e., that he performed more of a given type of surgical procedure than the average as computed by a health insurance carrier. Even if one assumes that divergence from the mean was enough to open a file, the prosecution failed to develop any further facts during three years of pre-indictment investigation, with the unlimited resources of the federal government and unlimited access to patients' medical records, *see* 18 U.S.C. § 3486. A modicum of factual investigation would have revealed two fatal defects, which together demolished the entire basis for the prosecution: (1) the indictment's allegation that Dr. Capener's surgeries were "unnecessary" because patients "could have been treated medically without surgery" was a lie, as shown unambiguously by the patients' prior medical histories; and (2) one of the principal (though undisclosed) assumptions for alleging that Dr. Capener's surgeries were "not done" also was false, as shown unambiguously by examining the actual pathology samples taken. The prosecution's failure to uncover these simple facts certainly was incompetent and unethical. The basic question is whether the resultant expense to the defendant is compensable under the Hyde Amendment.

The case is an appropriate vehicle for review because its extensive record documents the catastrophic consequences that follow upon prosecutors' failure to do a minimally competent and ethical job. Instead of investigating the simple facts, the prosecution pressed its case without facts, through uninformed expert opinion, and opposed the revelation of facts every step of the way, forcing Dr. Capener to prove his innocence, at the cost $1.4 million to him, and untold further millions of wasted taxpayer dollars. These are only part of the consequences, even to Dr. Capener, whose life and medical practice were uprooted, and enmeshed in civil and regulatory entanglements for years. But the most important costs are to the credibility of the federal criminal process itself.

This is because Dr. Capener's case regrettably is not so unusual, and the public is aware of that fact. According to a recent investigative series published by *USA Today*, it has documented over 200 cases of judicially-acknowledged misconduct by federal prosecutors since the Hyde Amendment was enacted, and even that may be a small sample of the actual incidence.[2] Very few such cases have produced Hyde compensation, which has led to

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[2] The articles appeared from September through December 2010, and may be accessed, together with the underlying documentation, under the series title of "Misconduct at the Justice Department," at www.usatoday.com /news/ Washington /judicial/2010-09-22-federal-prosecutors-reform_N.htm?loc=interstitialskip.

criticism that "the scarcity of compensation wins, amid a rise in misconduct charges, shows the law's not working."[3] The Department continues to defend its own self-policing efforts, but those too have been criticized, by a former U.S. Attorney, as "very, very poor. . . . serious discipline is basically non-existent."[4]

The history of the Hyde Amendment in the lower courts has produced neither uniform doctrine nor public confidence in the efficacy of this Congressionally-prescribed remedy for prosecutorial abuse. Perhaps the fault lies in the statute itself, or perhaps not. Either way, the definitive answer can come only from this Court.

II. Dissonance in the Lower Courts

The government's brief seeks to minimize the differing formulations of the Hyde Amendment standards in the lower courts, essentially arguing that differences in doctrine do not necessarily produce divergences in results. This too is a strange argument within a legal tradition governed by words. In any case, it contradicts what the courts of

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[3] "Not Guilty, But Stuck with Big Bills, Damaged Career," *USA Today*, September 27, 2010.

[4] "Federal Prosecutors Likely to Keep Jobs After Cases Collapse," *USA Today*, December 8, 2010 (quoting Joseph diGenova, former U.S. Attorney for the District of Columbia).

appeals themselves say, as, for example, in the First Circuit's *Knott* decision:

> "Circuit courts . . . have varied in interpreting the term 'vexatious.' The Gilbert court, for instance, relies on a[n] [objective] definition . . . . By contrast, the Ninth Circuit, in *United States v. Sherburne* . . . requires both [objective and subjective components]. . . . Other courts have utilized a standard more amenable to the party seeking fees. . . . [W] e reject the approach of Sherburne to the extent it suggests that such attention to subjective motivation is required."

United States v. Knott, 256 F.3d 20, 29-30 (1st Cir. 2001) (actually rejecting both *Gilbert* and *Sherburne*). Similarly, the Second Circuit's decision in *United States v. Schneider*, 395 F.3d 78 (2d Cir. 2005), not only declines to adopt any of the competing definitions of "vexatious, frivolous, or in bad faith," 395 F.3d at 86, but also explicitly notes that the decisions on discovery criteria "have reached differing conclusions," *id.* at 91. Thus, there are at least three (or four) different definitions of "vexatious," at least two of "frivolous," and two of "bad faith," as well as disagreements on discovery and fact-finding. (*See* Pet.24-28).

The government therefore is wrong in its contention that this Court should ignore the lower courts' divisions. But even those divisions are only part of more profound problems, because the lower

courts have confused the interpretation of the Hyde Amendment–essentially, a federal statutory question–with entirely distinct doctrines of constitutional law:

A. *"Probable Cause" and the Hyde Amendment.* In our law, "probable cause" is primarily a Fourth Amendment standard governing the constitutionality of arrest or search, and secondarily a standard of proof applicable in the grand jury or at preliminary hearing. Neither sense tracks with the purpose of the Hyde Amendment, which is a federal statutory standard, above constitutional minima. The government argues that "probable" or "reasonable" cause ought to be assimilated to the statutory standards of "frivolous" or "vexatious." (Opp.10-11). On this point, both the language and the sparse legislative history of the statute are directly to the contrary: if "probable cause" could defeat an award, then the statute could have no application whatever to an indicted offense, which would wholly defeat the statute's intent. Thus, at least the Sixth and Eighth Circuits, and, according to the government's argument, the Ninth Circuit (*see* Opp.11), are wrong. More fundamentally, the use of a predominantly Fourth Amendment standard has and will produce confusion in the lower courts, and needs to be rooted out.

B. *Prosecutorial Misconduct versus Prosecutorial "Mistake."* A second profound error can be traced back to the early *Gilbert* decision by the Eleventh Circuit, which coined the shibboleth that "the Hyde Amendment was targeted at prosecutorial misconduct, not prosecutorial mistake," *United*

States v. Gilbert, 198 F.3d 1293, 1304 (11th Cir. 1999). Even on its face, the phrase is problematic, as mistakes and misconduct are not necessarily mutually exclusive. It also was a saying invented by Judge Carnes to sum up a highly questionable exercise in legislative history construction, including such things as protest letters from Justice Department officials and newspaper articles, *see id.* at 1299-1303. But most fundamentally misguided was *Gilbert*'s particular version of "prosecutorial misconduct" as assimilated to the doctrine developed under the Due Process Clause of the Fourteenth Amendment, as exemplified by cases such as *Brady v. Maryland*, 373 US. 83 (1963). *See Gilbert*, 198 F.3d at 1304-05. Noting this Court's refusal to extend *Brady* to the federal grand jury phase, solely based on its inherent supervisory powers, *United States v. Williams*, 504 US. 36 (1992), the *Gilbert* court reasoned that such failures also could not suffice under Hyde, *see Gilbert*, 198 F.3d at 1305. This reasoning is profoundly wrong, because the Hyde Amendment was neither an expression of Fourteenth Amendment doctrine–applicable in both state and federal courts– nor a manifestation of this Court's inherent supervisory power, but rather was a Congressional enactment designed to provide an independent federal statutory remedy applicable only to federal prosecutors. Moreover, the particular application was wrong in content, because federal prosecutors *are* required by Justice Department standards to present exculpatory evidence to the grand jury. *United States Attorneys' Manual* 9-11.233.

The myopia displayed by *Gilbert* exemplifies the lower courts' failure to follow the Hyde Amendment's intent to operate as a check on federal prosecutorial overreach. Congress did not intend to standards of federal prosecution to the lowest-common-denominator of due process minima. Congress properly exercised its authority to demand better performance from the federal prosecutor, and the lower courts have not been faithful to that intent.

III. The Dangerous Precedent of a "Reliance on Experts" Defense

The government seeks to denigrate by footnote (Opp.12n.3) the disturbing implications of the court of appeals' ruling that the government may defend against a Hyde award by "reliance" on a hired expert, such as Dr. Rice, who is at least negligent, if not perjurious. This was both a factual and legal dispute between the parties, and between the district court and the court of appeals: the district court found not only that Dr. Rice was negligent, but also that the prosecutor had reason to know that Dr. Rice was wrong. It is unclear whether the court of appeals' reversal was partly factual, or entirely legal. But either way, it pollutes the Hyde Amendment with an alien and dangerous concept.

The standard of Hyde Amendment responsibility is an institutional one, based upon the "position of the United States." This language indicates that the "position of the United States" must include the position of anyone designated to speak for the United States, such as Dr. Rice. The

Ninth Circuit's holding contradicts that principle, by ruling that the government's position could be considered non-frivolous even where the position of its hireling was frivolous.

Whatever the merits of such a view in other contexts, such as civil litigation, this is an untenable ruling in criminal cases under the Hyde Amendment, because it invites the Department to delegate federal prosecutorial decisions outside of the Executive Branch, and outside the government entirely, by buying and paying for an expert, essentially as "cover" for a frivolous prosecution. This cannot be what Congress intended.

With few and limited exceptions, the federal prosecution function may not be delegated outside the Executive Branch, much less outside the government:

> "Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. . . . For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice."

Young v. United States ex rel. Vuitton Et Fils SA, 481 U.S. 787, 814 (1987). This principle is violated by allowing the Department to hide behind an "expert" hired to assess the factual basis for prosecution. It requires no great imagination to see the abusive

potential: nearly any federal prosecution can be "expertised" through "forensic science" or the like.

This case presents the issue in a severe form. Here the district court found as a fact that the government actually did not "rely" on Dr. Rice's fabrication (Pet.61a-63a), and that finding was amply supported in the record. So, the court of appeals' reversal was legal error, contrary to this Court's clear error precedent. (See Point V, below). But even aside from that point, no one will miss the implications for future cases. The "expertise" involved here was not exotic: any prosecutor conducting a medical case knows that the best evidence of a pathology sample is the slide itself, which in this case showed that Dr. Rice's theory was obviously false. Similarly, any prosecutor conducting a medical case knows better than to fabricate allegations about medical history without looking at the patients' medical records. To allow the "expertise" dodge to succeed in these circumstances is to build a superhighway for prosecutorial abuse.

IV. The Government's New Question

Another strange feature of the government's brief is its introduction of a new point (1.c of its Argument) contending that the Hyde Amendment "does not permit a fractional award like the district court made here." (Opp.13). The argument is procedurally irregular, and contributes nothing to certiorari consideration.

This point was first raised on appeal, and not preserved in the district court. The court of appeals never reached the issue (Pet.41a-42a), and it is not included in the Petition's questions presented (Pet.i-ii). Ordinarily, raising such a new question would require a cross-petition, but the Petitioner would not object to its consideration in a merits briefing. If this Court takes jurisdiction, it may consider the government's argument as an alternative ground for affirming the judgment below, and the Petitioner agrees that it too presents an important federal question. But it cannot support a denial of certiorari: because the court of appeals did not even reach the issue (and the district court was not presented with it), there is no decision to leave in place.

V. The "Clearly Erroneous" Standard and Fact-Boundedness

Any lawyer who has briefed more than a few certiorari petitions is familiar with the government's inveterate invocation of the "fact-bound" argument against review. (*See* Opp.7, 11-12, 15). However, incanting that saw is a bad choice here, as the court of appeals' application of a novel and deviant Ninth Circuit reformulation of clear error review to reverse the district court's findings of fact presents a pure question of law and a direct conflict with this Court's ruling decision in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), on a matter of exceptional importance to federal practice generally.

The government misstates both the case and the law by invoking this Court's reticence to review "concurrent findings of fact" (Opp.11). This petition does not question "concurrent" findings; it involves *conflicting* findings by the two lower courts–as the court of appeals reversed the district court's findings–which is why there is a legal question of clear error review. The same situation of appellate reversal of district court findings was involved in *Anderson* itself, and is the appropriate posture in which to review appellate courts' application of clear error doctrine.

Even the government concedes that the newly-minted Ninth Circuit standard of clear error is somewhat lacking in coherence (Opp.16). Its application here is even more problematic: as shown by the government's own description, the author of the court of appeals' panel decision–a district judge, sitting by designation–did not observe any variation of clear error review, instead opining that the district court finding "goes too far" (Opp.17).

The decision below creates a direct conflict with this Court's *Anderson* decision, and warrants review for that reason alone. However, the conflict is much deeper, given that the decision in this case applies a recent en banc decision announcing a new standard for our largest Circuit, and a standard that is predicated on a challenge to this Court's previous decisions. (*See* Pet.33-35).

Conclusion

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

/s/
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